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Supreme Court of the United States

OCTOBER TERM, 1961

No. 919

JEANETTE E. GONDECK, Intervenor,

Petitioner,

vs.

PAN AMERICAN WORLD AIRWAYS, INCORPORATED and THE TRAVELERS INSURANCE COMPANY,

Respondents,

PETITION FOR REHEARING

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THE OPINION BELOW

The opinion below is now reported at 299 F.2d 74.

STATEMENT

Comes now the Petitioner JEANETTE GONDECK, pursuant to Rule 58(2), of the Supreme Court Rules, and moves the Court to grant a rehearing on the Petition for certiorari to the United States Court of Appeals for the Fifth Circuit, which was denied on June 11, 1962, and for grounds therefore would show unto the Court:

1. That there have occurred intervening circumstances of substantial and controlling effect — the award of compensation benefits to the widow and children of a passenger in the jeep, who was killed at the same time as FRANK GONDECK.

2. That there are other substantial grounds for review not presented in the petition — the prayer that the cause be returned to the Deputy Commissioner for further evidence and findings to complete the record.

REASONS FOR GRANTING REHEARING

I

Where Two Forums Consider the Same Case and Reach Different Results, the Only Way To Resolve the Conflict Is By Review in the Court

The Decedent was killed on San Salvador Island while employed at the United States Air Force Base as a civilian employee, while returning to the base as a passenger in a company jeep. Another passenger in the jeep was Robert M. Smith.

Smith's widow made a claim for compensation in the Fifth Compensation District pursuant to the Defense Bases Act., 42 U.S.C.A., § 1651, et.seq. The Deputy Commissioner entered an award of benefits under the Act to Mrs. Smith and her children. On review to the United States District Court for the Eastern District of Virginia, Civil Action No. 3136, the District Judge, by order of

March 15, 1961, remanded the cause for further findings. The opinions are not reported.

On April 5, 1962, the Deputy Commissioner entered a supplemental compensation order with additional findings, and renewed the award of compensation. The supplemental compensation order of the Fifth Compensation District of April 5, 1962, is set out in full in the appendix attached hereto.

With the case back in the Eastern District of Virginia, the deputy commissioner moved for summary judgment on June 25, 1962; that is the posture of the Smith case as this petition is filed.

Consequently, on the facts, we are faced with the anomalous situation where two workers have been killed in the same accident and the widow and children of one will receive compensation, and the widow and the child of the other will not.

The stipulation of facts in the cause at bar (TR. 7-13), (Respondent's Appendix 1-7) are materially at variance with the findings of fact of the Smith case. The findings of fact in both cases should be the same. The facts are the same.

Consequently, we have two forums reviewing the very same case and arriving at different results. This is a classic case for granting certiorari on rehearing. **Sanitary Refrigerator Co. v. Winters,** 280 U.S. 30, 34 (1929).

II

There Would Seem To Be a Conflict In Circuits On the Procedure for Remanding Compensation Orders For Additional Findings

The Petitioner requested the court below to remand the cause for additional findings by the deputy commissioner for completion of the record. The court refused to grant this relief.

The District Judge in the Smith case held that the record was incomplete and ordered new hearings and findings by the deputy commissioner. He was apparently following the practice of the Fourth Circuit.

The Sixth Circuit has assumed the authority that it may, sua sponte, remand a case under the Longshoremen's and Harbor Workers' Compensation Act, Title 33 U.S.C.A. § 901, et seq., for completion of the record by taking additional testimony and making new findings. **Dixie Sand & Gravel Corp. v. Holland,** 255 F. 2d 304 (6th Cir. 1958). Other circuits follow this procedure. **Ng. Yip Yee v. Barber,** 267 F.2d 206 (9th Cir. 1959); **Monrote v. Britton,** 237 F.2d 756 (D.C. Cir. 1956); **Vendemia v. Cristaldi,** 221 F.2d 103 (D.C. Cir. 1955); **Morand Bros. Beverage Co. v. NLRB,** 190 F.2d 576 (7th Cir. 1951); **American Broadcasting Co. v. Federal Communication Commission,** 179 F.2d 437 (D.C. Cir. 1948); **Ocean S.S. Co. of Savannah v. Lawson,** 68 F.2d 55 (5th Cir. 1933).

The Gondeck case was submitted on stipulated facts. All the pertinent facts were in the control of the employer. Mrs. Gondeck's attorney relied on the integrity

of the employer in reporting the pertinent facts. However, on a full investigation with testimony taken, and documentary evidence submitted the deputy commissioner in the Smith case found several material variances between the evidence in both cases. For instance, the deputy in the Smith case found that no bus service was provided between the base and town; that use of the jeep was not forbidden; that the road on which the accident occurred was built and maintained by the employer. It would seem that the deputy commissioner should be permitted to conduct further hearings to resolve these material conflicts.

The authority for remand to the Deputy Commissioner for further evidence and findings is an integral part of both Acts, the Administrative Procedure Act, Title 5 U.S.C.A., Sec. 1009, The Longshoremen's and Harborworkers' Compensation Act, Title 33 U.S.C.A., Sections 918, 921.

CONCLUSION

It is respectfully submitted that rehearing be granted and the cause reviewed for remand to the deputy commissioner for further evidence and findings.

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CERTIFICATE OF GOOD FAITH

I HEREBY CERTIFY that this Petition for Rehearing is presented in good faith and not for delay in the final determination of the cause. I further certify that the Petition is restricted to the grounds set forth, the intervention of circumstances of substantial and controlling effect, and other substantial grounds not previously presented.

Norman Miller

CERTIFICATE OF SERVICE

I hereby certify that pursuant to Supreme Court Rule 33(1) copies of the foregoing brief were served upon Leo M. Alpert, 1112 Biscayne Building, Miami 32, Florida, attorney for Respondents to Lloyd G. Bates, Jr., Assistant United States Attorney, Post Office Building, Miami, Florida; and to the Attorney General, Department of Justice, Washington 25, D.C., by depositing same in the United States Post Office with first class postage prepaid thereon on this_____day of June, 1962.

Norman Miller

APPENDIX

U. S. DEPARTMENT OF LABOR
BUREAU OF EMPLOYEES' COMPENSATION
FIFTH COMPENSATION DISTRICT

SUPPLEMENTAL COMPENSATION ORDER

CASE NO. DB-C-773-376

In the matter of the claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act.

Dorothy A. Smith, widow of
Robert M. Smith, deceased employee,

Claimant.

v.

Pan-American World Airways, Inc.,

Employer.

Travelers Insurance Co.,

Insurance Carrier.

A compensation order was filed in the above entitled case on 22 December 1959 by the Deputy Commissioner, in which the Deputy Commissioner awarded compensation to Dorothy A. Smith, widow, and Robert Monroe Smith and Dennis Andrew Smith, minor children of Robert M. Smith, deceased employee.

On 21 January 1960 the employer and insurance carrier above named instituted a proceeding for judicial review of said compensation order in the United States District Court for the Eastern District of Virginia, Norfolk Division, Civil Action No. 3136.

On 15 March 1961 the Court entered an order remanding the case to the Deputy Commissioner for further findings of fact with reference to the question of whether or not the death of Robert Smith arose out of and in the course of his employment.

Such further investigation in respect to the question of whether or not the death of Robert Smith arose out of and in the course of his employment having been made as is considered necessary, and a further hearing having been duly held in conformity with law, the Deputy Commissioner makes the following:

SUPPLEMENTARY FINDINGS OF FACT

That the deceased herein at the time of his injury and death was on a temporary duty assignment for the employer on the Island of San Salvador; that the contract of hire was for 45 days; that San Salvador, W. I., is an island with maximum dimensions of 13 miles by 5 miles and comprising 42 square miles, with a native population of about 800; that the employer's installations were in various parts of the island, so that the entire island was practically the work site; that the contract of hire required the employer to furnish transportation from the point of hire to the down range bases where the work was to be performed, and on completion of the contract to return the employee to the point of hire, Miami, Florida, for a

7-day paid vacation; that if both parties were in agreement, the contract was renewable for another 45 days, at the same or another down range base, and thereafter for 3-month periods, with 14-day leave periods; that by the terms of the employment they agreed to furnish the employee at the work site with room, board, recreation and transportation, etc.; that on 24 April 1958 the deceased herein having completed his regular work assignment for the day, but on call in case of need, left the employer's camp with three fellow employees in an employer's jeep, operated by one of the fellow employees, to visit Cockburn Town about three miles away; that before starting back to the camp the party stopped at a native tavern, a place where employees of the employer were commonly known to stop for a beer; that on the return trip to the camp, within one-half hour of their departure, and on a road maintained by the employer, near the main gate of the camp the jeep went out of control of the driver into a skid and turned over, causing the injury and death of the deceased employee herein; that the use of employer's vehicles was authorized on application to the recreation officer; that the recreation officer did not issue a trip ticket or other paper in writing when authorizing the use of a vehicle for recreation purposes; that there was no prohibition against an employee riding as a passenger in a vehicle of the employer; that the employer did not maintain any other transportation between the town and camp for the employees; that the exigencies of the employment required him to remain on the island; that the work site being a small island, the employee could not escape the work environment; that at the time of his injury and death the deceased herein was engaged in an activity which, under the circumstances, was incidental to his employment; that the compensation

order filed on 22 December 1959 is made a part of this order by reference.

Given under my name at Norfolk, Virginia, this 5th day of April 1962.

STEPHEN O'HEARNE
Stephen O'Hearne
Deputy Commissioner
Fifth Compensation District